



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

CIVIL DIVISION

MISC. APPLI. 102 OF 2007

MURINGA HOLDINGS LTD.....APPLICANT

Versus

1. TELKOM KENYA LTD.)

2. PERMANENT SECRETARY MINISTRY

OF INFORMATION & COMMUNICATION)

3. THE ATTORNEY GENERAL).....RESPONDENTS

JUDGMENT

The Amended Notice of Motion is expressed to be brought pursuant to Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya and Order 53 Rules 1, 2, 3 and 4 Civil procedure Rules, Judicature Act and Civil Procedure Act. The ex parte applicant is Muringa Holdings Ltd. who seeks the following orders against Telkom Kenya Ltd, the Permanent Secretary Ministry of Information and Communication, the Attorney General and the Public Procurement Complaints Review and Appeals Board;

- (1) an order of certiorari quashing the decision of the Public Procurement Appeals and Review Board (the Board) delivered on 15th January 2007;
- (2) that the court do make a finding that the Applicants appeal was successful and the tender awarded be cancelled as the Tribunal failed to follow due process;
- (3) and or in the alternative, an order of certiorari do issue, quashing the decision of the Respondents in inquiring or disqualifying the Applicant and awarding the tender No. TKL/TLC/45/2101 to Egyptian Electronic Technology Company or any other bidder;
- (4) And or in the alternative, the court do issue an order of prohibition prohibiting Telkom (K) Ltd and the Permanent Secretary from implementing or continuing to implement or execute any contract that may have been entered into pursuant to the award of tender;
- (5) Costs of the Application be provided for.

The motion is premised on the Amended Statement of 30th July 2007 and a verifying affidavit dated and filed in court on 14th February 2007 by Elijah John Mwangi. The amended notice of Motion was also

filed with a supporting affidavit sworn by Charles Njuru Kihara, Counsel for the Applicant.

The motion was opposed and Paul Bongo Jilani the Company Secretary of the 1st Respondent swore a replying affidavit dated 22nd March 2007 and skeletal arguments on 29th May 2002 and supplementary arguments filed on 17th June 2007. The 2nd and 3rd Respondents only filed grounds of opposition on 5th October 2007 and 4th May 2008.

A brief background of this case is that Telkom Kenya Ltd. advertised a tender for a joint venture for Gilgil Telecommunications Industries No. TKL/T & C/45/2006. Two companies responded to the advert. The Applicant did not get the tender and appealed to the Board. Egyptian Electronic Technology won the tender yet, according to the Applicant, it had not complied with the rules. Before the Board, a preliminary objection was taken by the 1st Respondent that the Board lacked jurisdiction to hear and determine the appeal as the tender complained of was not a public procurement under the Exchequer and Audit Act and Regulations. That the Interested Party, Egyptian Electronic Technology Co. also took up the same objection which the Board upheld and dismissed the appeal. The decision to award that tender is what is challenged herein. The Applicant also seeks to stop the award of the contract to the Interested Party. The Applicant also contends that the 1st Respondent breached their legitimate expectation that the tender would be conducted fairly under the 2001 Rules and lastly that the procurement was a public one in terms of S.2 of the Exchequer Act as it involved disposal of a Government Asset. Mr. Gilani in his affidavit deposed that the Applicant did not attain the 75% minimum score required to qualify for financial evaluation and set out the reasons scores at paragraph 12 of his affidavit. That the Board did not in its decision because Regulations 2 of the Public Procurement Regulation 2001 defines what a Public procurement entails and that it was defined in the case of **REP V PUBLIC PROCUREMENT COMPLAINTS REVIEW & APPEALS BOARD ex parte KENATCO LTD. MISC 50/04.**

Mr. Wekesa, Counsel for the 1st Respondent urged that the Notice of Motion is fatally defective since there is no Applicant. That the Republic is not named as the applicant which renders the application fatally incompetent.

The decision of the EACA in **FARMERS BUS V TRANSPORT LICENSING APPEAL TRIBUNAL (1959) EA 779; HENRY AMWAYI NDETI V CHAIRMAN LDT MISC APPLICATION 79/02** and **TRIPLE EIGHT INVESTMENTS LTD V CITY FINANCE BANK LTD. CA 223/00** have all held that in Judicial Review proceedings the Notice of Motion is brought in the name of the Republic.

That in the above cases, the court found motions brought without the Republic being named as an Applicant were incompetent. The Respondent also took issue with the failure by the Applicant to exhibit the impugned decision. Counsel submitted that since the award was not exhibited, there was nothing for the court to quash. It is also the Respondents case that prayer 2 of the amended Notice of Motion cannot issue because it is amorphous and speculative and prohibition cannot be granted because there is nothing pending to prohibit.

Mr. Omondi counsel for the 2nd and 3rd Respondents urged the grounds in the Preliminary Objection. The first point taken was that the 2nd and 3rd Respondents were not procuring entities and should not have been enjoined to these proceedings and no allegation was made against them. He also reiterated the objection raised by Mr. Wekesa, Counsel for the 1st Respondent that the motion is fatally defective having failed to name the Republic as the applicant. He also urged that an order of prohibition could not issue as the decision had already been made on the merits. He urged the court to dismiss the motion.

I have considered the rival arguments in this motion and the cases cited by all Counsel the Board erred in its decision because the tender was by Gilgil Telecommunications which is a subsidiary of Telkom (K) Ltd. which acquires property by use of public funds and that the tender process was admitted by the 1st Respondent.

I have now considered the rival arguments of all counsel and the cases that the facts relied upon. The court deems it proper to deal with the objections raised before going to the merits of this motion. The Amended Notice of Motion is brought in the name of Muringa Holdings Ltd. as the Applicant. It is trite law that all Judicial Review Applications are brought in the name of the Republic and should be properly instituted. This was the decision in the East African Court of Appeal in **FARMERS BUS LTD (supra)** which has been followed by a host of other decisions of **JOTHAM MULATI WELAMONDI V THE CHAIRMAN ECK MISC APPLICATION 54/02** and many others. Counsel for the Applicant argued that the court in **FARMERS BUS CASE** allowed an amendment of the documents. However, it should be noted that was an appeal in a Judicial Review Application which is not the case here. The courts have held that if a Judicial Review application is not brought in the name of the Republic, it is fatally defective and has to be struck out. Despite the fact that the Applicant was given a chance to amend the motion they repeated the same mistake by failing to name the Republic as an Applicant.

In the instant motion the ex parte Applicant has no capacity to bring the Judicial Review application. This is because Judicial Review is a mechanism by the state checking on the excesses of its public bodies and public officers and the state steps in the shoes of the ex parte applicant and brings the application on behalf of the ex parte Applicant. In **WELAMONDI CASE (supra)** Justice Ringera set out the formats of bringing Judicial Review applications both at leave stage and substantive motion stage, as had been set out in the **FARMERS BUS CASE (supra)**. The Applicant's Notice of Motion herein is therefore fatally defective and is for striking out.

Order 53 Rule 3(2) Civil Procedure Rules requires that once the notice of motion is filed leave having been granted, it should be served on all persons directly affected. In the instant case, the Applicant is challenging the Board's decision to strike out its appeal and also challenging the tender award. Before the Board were the Applicant, the 1st Respondent who is the procuring entity and another bidder by name of Egyptian Electronic Technology who won the tender bid. This company was party to the proceedings before the Board and would be directly affected by the decision of this court as it was the winner of bid. If the court quashes the award it stands to lose. It is an interested party or affected party and should have been enjoined to these proceedings as an Interested Party. Order 53 rule 3 (2) is meant to protect Interested Parties so that they are not condemned unheard. It upholds the cardinal principle of natural justice that no one should be condemned unheard. Failure to serve the said Interested Party would be prejudicial to them as they would not have had an input in this matter. Order 53 rule 3 (2) is couched in mandatory terms and failure to comply with it renders the motion incompetent and the result would be that it has to be struck out.

Further to the above I do uphold the Respondent's contention that the

- 1) Permanent Secretary Ministry of Information and Telecommunication is wrongly enjoined. Telcom was the procuring entity and being a public body should be the one to be sued. May be the Attorney General could only be enjoined as the legal representative of the Government but no orders can lie against the Permanent Secretary (2nd Respondent)
- 2) The Applicant did not exhibit the award under challenge. Order 53 Rule 7 Civil Procedure Rules requires that the decision sought to be quashed should be lodged with the court, verified by an affidavit before the hearing of the motion. Failing to do so, the Applicant should give a satisfactory explanation as to why the decision could not be lodged. The Applicant neither lodged the decision nor did he offer any explanation to the court. In the instant case, it is not disputed that the tender was granted to another bidder and that the Applicant's appeal to the Board was dismissed. The Respondent could as well have exhibited the award. In my view failure to lodge the award could not render the application incompetent. In the case of **REP V RETURNING OFFICER KAMUKUNJI CONSTITUENCY ex parte SIMON MBUGUA MISC 13/08**, Nyamu and Wendoh JJ agreed with the reasoning in the case of **R V LANCASHIRE COUNTY COUNCIL ex parte HUDDLES (1986) 2 ALL ER page 65** where the court observed:

“Judicial Review is a process which falls to be conducted with all the cards face upwards on the table and where the vast majority of the cards will start in the public authority's hands the

Defendant should set out fully what they did and why, so far as necessary fully, fairly to meet the challenge”.

Again in **R V SECRETARY OF STATE FOR TRANSPORT ex parte LONDON BOROUGH OF RICHMOND UPON THAMES (NO. 3) (1995) ALL ER 409**. Sedley J. held;

“the want of an identifiable decision is not fatal to an application for Judicial Revision”

In the instant case, the decision is that the tender was awarded to another party and the Applicant challenged that decision in the Appeals Board. This application could not have been defeated on that basis of lack of the Applicant to lodge it when the Respondent made it and was aware of it alone. The court held that all parties had a duty to avail the impugned decision and I would hold the same view.

Prayer 2 of the Notice of Motion is amorphous. It does not seek any specific prayer. In Judicial Review, (S.8 Law Reform Act) only orders of certiorari, mandamus and prohibition can issue. Prayer 2 cannot lie.

For the above reasons I find it unnecessary to go into the merits of this motion in the event that the Applicant would wish to file a fresh application. The Applicants Notice of Motion stands struck out with costs to the Respondents.

Dated and delivered this 28th day of August 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. C.N. Kihara for Applicant

Mr. Wekesa for 1st Respondent

Daniel: Court Clerk